

**SOAH DOCKET NO. 582-10-4184
TCEQ DOCKET NO. 2005-1490-WR**

CONCERNING THE APPLICATION	§	BEFORE THE
	§	
BY THE BRAZOS RIVER	§	
AUTHORITY	§	TEXAS COMMISSION ON
	§	
FOR WATER USE PERMIT NO. 5851	§	
AND RELATED FILINGS	§	ENVIRONMENTAL QUALITY

LAKE GRANBURY COALITION’S BRIEF ON CERTIFIED QUESTIONS

TO THE HONORABLE COMMISSIONERS:

The City of Granbury, Hood County, and the Lake Granbury Waterfront Owners Association (collectively, the “Lake Granbury Coalition”) file this brief on the questions certified by the Administrative Law Judges and respectfully show the following:

INTRODUCTION

By the admission of all parties to this proceeding, it is not possible for the Brazos River Authority’s Permit No. 5851 to issue – if at all – prior to May 2014. Meanwhile, the proposed Senate Bill 3 environmental flow standards for the Brazos River Basin will be adopted in February or March of 2014 and will apply to all new water permits issued after their effective date. Therefore, by the plain terms of the existing statutes and regulations, BRA’s requested permit must comply with these new legislatively-mandated environmental flow standards.

BRA’s essential argument, as presented to the Administrative Law Judges, is that incorporation of the new standards now will cause a delay in its efforts to obtain this permit, and that the Executive Director’s prior review of the permit application without the SB 3 standards will have been wasted time and effort. But BRA’s proposed solution – a delay or transition period in applying these standards to its permit application – does nothing to address these

issues. Instead, it proposes to create *more* inefficiency by delaying for an unspecified number of years the review, evaluation, and incorporation of these mandatory environmental flow standards as they pertain to the SysOp Permit. Incorporation of these standards must necessarily occur sooner or later if BRA is to obtain this permit; BRA simply proposes that it occur later, which is not an efficient solution from the perspective of anyone but BRA, as it seeks the earliest possible grant of its application.

For reasons of legality and efficiency alike, the Commissioners should decline BRA's invitation to temporarily ignore the new SB 3 standards in the context of this permit application.

ARGUMENT

A. By statute and regulation, the new environmental flow standards unambiguously apply to BRA's permit application.

The first three questions, as proposed by BRA and certified by the ALJs, essentially ask the Commissioners to determine whether the new environmental flow standards truly must apply to BRA's application. The answer is yes. By the plain terms of the existing statutes and regulations, these standards apply to new permits issued after their effective date. BRA will likely argue that the TCEQ has discretion in determining that effective date and that the Legislature has not precluded such discretion, but the statutes and regulations provide no affirmative support for that argument. On the contrary, these authorities contemplate that the SB 3 standards will be applied to any new water right following their adoption.

The Legislature's direction on this issue has been straightforward. Section 11.147(e-3) of the Water Code declares that once environmental flow standards have been adopted under Section 11.1471, "the commission *shall* apply any applicable environmental flow standard, including any environmental set-aside" instead of considering the interim conditions laid out in § 11.147 (b)-(e). *See* TEX. WATER CODE § 11.147(e-3) (emphasis added). Section 11.1471 further

clarifies the intended timing of the SB 3 rules. It states that a permit for a new appropriation “that is issued *after the adoption of an applicable environmental flow set-aside* must contain appropriate conditions to ensure protection of the environmental flow set-aside.” *Id.* § 11.1471(d) (emphasis added). Thus, the Legislature contemplated that permits issued after the adoption of this new environmental flow regime would be subject to its provisions and evaluated for compliance therewith.

TCEQ has adopted and proposed rules following the Legislature’s direction. Section 298.10 provides that these environmental flow standards, once adopted, apply to any permit for a new appropriation of water pending on or after September 1, 2007. *See* 30 TEX. ADMIN. CODE § 298.10(a); *see also id.* § 298.15 (“[T]he commission *shall* apply any applicable environmental flow standard, including any environmental flow set-aside, adopted in this chapter, instead of considering the factors specified in Texas Water Code § 11.147(b)-(e).”) (emphasis added). Similarly, the proposed rules for the Brazos Basin – the standards to which BRA’s requested permit would be subject – include a provision declaring that water right permits “issued after the effective date of this subchapter . . . shall contain flow restriction special conditions that are adequate to protect the environmental flow standards of this subchapter.” *See* Rule Project Number 2013-009-298-OW, Proposed Rule § 298.485.

In sum, there is no need for interpretation of existing law – the new environmental flow standards should apply to BRA’s permit application. By claiming that the Commission has discretion to begin applying these standards at a time of its choosing, BRA reads discretion and exceptions into the legislation that do not appear in the text of the statute. These statutes and rules employ mandatory, not permissive language (*i.e.* “shall” and “must”). *See* TEX. GOV’T

CODE § 311.016.¹ Moreover, the “reopener” provision in section 11.147(e-1) does not grant TCEQ the right to temporarily ignore the Chapter 298 environmental flow standards; instead, that provision simply allows TCEQ to adjust previous interim permit conditions once “environmental flow standards [are] adopted under Section 11.1471.” *See* TEX. WATER CODE § 11.147(e-1); *see also* Friends of the Brazos River et al.’s Response to BRA’s Motion to Certify Questions at 2 (SOAH Dkt. 225, Oct. 14, 2013). In the event there are actually environmental flow standards to apply when a permit issues – as would be the case here, if BRA’s application is granted – the Water Code is clear that “the commission *shall* apply” those standards, instead of relying on the interim conditions in section 11.147(b)-(e). *See* TEX. WATER CODE § 11.147(e-3) (emphasis added).

Ultimately, then, this is not a question of “which” environmental flow standards will apply to the SysOp Permit Application, as BRA suggests. There is only one set of environmental flow standards required by Texas law, and by the time this contested case reaches a hearing, it appears that the Brazos River Basin *will* have such an applicable standard. The Legislature has indicated that once these standards are adopted, they should be applied to all permits issued thereafter. *See id.* §§ 11.147(e-3) & 11.1471(d). Permit Application No. 5851 is no exception.

B. The *ad hoc* exception BRA proposes is improper and inefficient.

Even if TCEQ did have the discretion to delay the application of these new environmental flow standards, it would be unwise and improper to adopt a “transition rule” that

¹ As demonstrated by the questions themselves, BRA intends to argue that any timing requirement for adoption of the new environmental flow standards is merely directory, not mandatory. *See* BRA’s Reply to Responses to Motion to Certify Questions at 3 (SOAH Dkt. 231, Oct. 15, 2013) (citing cases). Ignoring, for a moment, that the statute contains no such suggestion, the cases cited by BRA are irrelevant to this issue. Those cases all dealt with allegedly jurisdictional prerequisites to suit, and simply stand for the proposition that not all statutory deadlines impose consequences for noncompliance. *See, e.g. TJFA, L.P. v. Tex. Comm’n on Env’tl. Quality*, 368 S.W.3d 727, 734 (Tex. App.—Austin 2012, pet. denied). That is a very different proposition than the one BRA proposes, *i.e.* that an administrative agency can avoid a clear legislative directive to create and apply new rules simply because it would be inconvenient to an applicant to apply the rules immediately.

would exempt BRA from them for at least the next several years. These long-anticipated requirements should be applied as written to all permit applications issued after their effective date, including BRA's proposed SysOp Permit. This would not, as BRA has suggested in its briefing to the ALJs, lead to an inefficient result. To the contrary, application of the Code as written would ultimately save all parties time and effort.

No party should take lightly the additional effort that application of the new environmental flow standards will require from BRA and TCEQ staff. But under BRA's proposed transition rule (and if BRA's permit is granted, as it has requested), this work would be required in the next three-plus years anyway. Accordingly, the relevant issue is whether BRA will be entitled to, in the interim, seek its permit, and bring all parties and the ALJs through a contested case hearing, without having the ALJs or the Commissioners evaluate the permit for compliance with the SB 3 standards that will already be in effect. The question answers itself. The new environmental flow standards could affect the water availability analysis and the application's compliance with other statutory and regulatory requirements, perhaps in significant ways. *See* TEX. WATER CODE § 11.1471(d). It simply does not make sense to rush a new permit application – particularly one of unprecedented magnitude and complexity – when its fundamental hydrology may be obsolete from the moment it issues.

While the existing permit application does contain detailed environmental flow provisions that are, in BRA's estimation, "very comparable" to the proposed SB3 standards, they are admittedly different. BRA acknowledges this and concedes that three to four months of revision to the Water Management Plan, and three more months of additional review time by the Executive Director will be necessary in order to incorporate the new standards. *See* BRA's Motion to Certify Questions at 2 (SOAH Dkt. 217, Oct.7, 2013). Accordingly, common sense, a

legislative mandate, and *all* parties' interests in the efficiency of this proceeding require that the effect of the SB 3 standards be determined *before* any new water right goes into effect, rather than several years later.

Finally, any additional delay and expense that arises from making BRA accountable to this generally applicable law is largely BRA's doing. BRA has noted in previous briefing on this issue that the SysOp Permit Application has been pending since 2004, presumably to demonstrate that no more delay can be tolerated. However, the reason this application is still being litigated is BRA's insistence on a two-step process that sought a significant, undefined appropriation of new water in one stage and promised to specify diversion points and rates (along with other legal requirements) in another. Had BRA simply complied with Texas law the first time around, the permit would have simply been granted or denied without the need to demonstrate immediate compliance with these as-yet-uncreated environmental flow standards. But now that Texas law on environmental flows is unquestionably different, BRA should not be heard to say that a delay of its own doing is sufficient reason to create an *ad hoc* exception.

CONCLUSION

The proposed SB 3 environmental flow standards – now more than six years in the making – should be applied as written to all permit applications issued after their effective date, including BRA's proposed SysOp Permit. This conclusion is consistent with existing statutory and regulatory guidance, which should not be circumvented by the creation of an unwarranted exception. Rather, any new water right must be judged for its consistency with all Texas water laws *before* any such right is granted. Applying the final, effective environmental flow standards to this complex application the first time around is the only sensible and efficient approach. The

Commissioners should therefore conclude that the SB 3 standards apply to BRA's permit and answer the certified questions accordingly.

Respectfully submitted,

/s/ John Turner

Jeff Civins
Texas State Bar No. 4256700
jeff.civins@haynesboone.com
HAYNES AND BOONE, LLP
600 Congress Avenue, Suite 1300
Austin, Texas 78701-3285
Tel: 512-867-8477
Fax: 512-867-8691

John W. Turner
Texas State Bar No. 24028085
john.turner@haynesboone.com
Anne M. Johnson
Texas State Bar No. 00794271
anne.johnson@haynesboone.com
Andrew W. Guthrie
Texas State Bar No. 24078606
andrew.guthrie@haynesboone.com
HAYNES AND BOONE, LLP
2323 Victory Avenue, Suite 700
Dallas, Texas 75219
Tel: 214-651-5000
Fax: 214-651-5940

ATTORNEYS FOR THE LAKE GRANBURY COALITION

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served via electronic transmission or first class mail on all parties whose names appear below on this 28th day of October, 2013.

/s/ John Turner

John Turner

<p>FOR THE CHIEF CLERK: <i>(via e-filing)</i> Bridget Bohac Office of the Chief Clerk, MC 105 Texas Commission on Environmental Quality P.O. Box 13087 Austin, TX 78711-3087 512-239-3300 512-239-3311 (fax)</p>	<p>FOR BRAZOS RIVER AUTHORITY: Douglas G. Caroom Emily W. Rogers Susan M. Maxwell Bickerstaff Heath Delgado Acosta LLP 3711 S. MoPac Expressway Building One, Suite 300 Austin, TX 78746 512-472-8021 512-320-5638 (fax) dcaroom@bickerstaff.com erogers@bickerstaff.com smaxwell@bickerstaff.com</p>
<p>FOR THE ADMINISTRATIVE LAW JUDGES: <i>(via e-filing)</i> William G. Newchurch Hunter Burkhalter State Office of Administrative Hearings 300 W. 15th St., Suite 502 Austin, TX 78701 512-475-4993 512-322-2061 (fax)</p>	<p>FOR PUBLIC INTEREST COUNSEL: Eli Martinez, Attorney Texas Commission on Environmental Quality Public Interest Counsel, MC-103 P.O. Box 13087 Austin, TX 78711-3087 512-239-3974 512-239-6377 (fax) elmartin@tceq.state.tx.us</p>

<p>FOR THE EXECUTIVE DIRECTOR: Robin Smith, Staff Attorney Ross W. Henderson, Attorney Texas Commission on Environmental Quality Environmental Law Division, MC-173 PO Box 13087 Austin, TX 78711-3087 512-239-0463 512-239-3434 (fax) rsmith@tceq.state.tx.us rhenders@tceq.state.tx.us</p>	<p>FOR TEXAS PARKS AND WILDLIFE DEPARTMENT: Colette Barron Bradsby Texas Parks and Wildlife Department 4200 Smith School Rd. Austin, TX 78744 512-389-8899 512-389-4482 (fax) colette.barron@tpwd.state.tx.us</p>
<p>FOR THE FRIENDS OF THE BRAZOS RIVER, H. JANE VAUGHN, LAWRENCE WILSON, MARY LEE LILLY, BRAZOS RIVER ALLIANCE, KEN W. HACKETT, AND JOE WILLIAMS: Richard Lowerre Marisa Perales Lowerre Frederick Perales Allmon & Rockwell 707 Rio Grande St., Suite 200 Austin, TX 78701 512-469-6000 512-482-9346 (fax) rl@lf-lawfirm.com marisa@lf-lawfirm.com</p>	<p>FOR GULF COAST WATER AUTHORITY: Molly Cagle Paulina A. Williams Baker Botts L.L.P. 98 San Jacinto Blvd., Suite 1500 Austin, TX 78701 512-322-2532 512-322-2501 (fax) molly.cagle@bakerbotts.com paulina.williams@bakerbotts.com</p> <p>Ronald J. Freeman Freeman & Corbett LLP 8500 Bluffstone Cove, Ste. B-104 Austin, TX 78759 512-451-6689 512-453-0865 (fax) rffreeman@freemanandcorbett.com</p>
<p>FOR THE NATIONAL WILDLIFE FEDERATION: Myron J. Hess 44 East Ave., Suite 200 Austin, TX 78701 512-610-7754 512-476-9810 (fax) hess@nwf.org</p>	<p>FOR THE CITY OF LUBBOCK: Brad B. Castleberry Lloyd Gosselink Rochelle & Townsend, P.C. 816 Congress Ave., Suite 1900 Austin, TX 78701 512-322-5800 512-472-0532 (fax) bcastleberry@lglawfirm.com</p>

<p>FOR THE CITY OF BRYAN: Jim Mathews Mathews & Freeland L.L.P. P.O. Box 1568 Austin, Texas 78767-1568 512-404-7800 512-703-2785 (fax) jmathews@mandf.com</p>	<p>FOR THE CITY OF COLLEGE STATION: Jason Hill Lloyd Gosselink Rochelle & Townsend, P.C. 816 Congress Ave., Suite 1900 Austin, TX 78701 512-322-5855 512-874-3955 (fax) jhill@lglawfirm.com</p>
<p>FOR DOW CHEMICAL CO.: Fred B. Werkenthin, Jr. Booth, Ahrens & Werkenthin, PC 515 Congress Ave., Suite 1515 Austin, TX 78701 512-472-3263 512-473-2609 (fax) fbw@baw.com</p>	<p>FOR THE CITY OF ROUND ROCK: Steve Sheets Sheets & Crossfield PC 309 E. Main St. Round Rock, TX 78664 512-255-8877 512-255-8986 (fax) slsheets@sheets-crossfield.com</p>
<p>FOR BRADLEY B. WARE, THE COMANCHE COUNTY GROWERS, AND WILLIAM & GLADYS GAVRANOVIC: Gwendolyn Hill Webb Stephen P. Webb Webb & Webb P.O. Box 1329 Austin, TX 78767 512-472-9990 512-472-3183 (fax) g.hill.webb@webbwebblaw.com s.p.webb@webbwebblaw.com</p>	<p>FOR THE POSSUM KINGDOM LAKE ASSOCIATION: John J. Vay The AL Law Group, PLLC 710A West 14th Street Austin, Texas 78701 512-669-5069 855-669-5069 (fax) john@allawgp.com</p>

<p>FOR THE CITY OF HOUSTON: Ed McCarthy, Jr. Eddie McCarthy Jackson, Sjoberg, McCarthy & Townsend, L.L.P. 711 West 7th Street Austin, Texas 78701 512 472-7600 512-225-5565 (fax) emccarthy@jacksonsjoberg.com emc@jacksonsjoberg.com</p>	<p>FOR CHISHOLM TRAIL VENTURES, L.P.: Monica Jacobs Shana Horton Kelly Hart & Hallman LLP 301 Congress, Suite 2000 Austin, Texas 78701 512-495-6405 512-495-6601 (fax) monica.jacobs@kellyhart.com shana.horton@kellyhart.com</p> <p>Chad Richwine Kelly Hart & Hallman LLP 201 Main St., Ste. 2500 Fort Worth, TX 76102 817-878-9366 817-878-9871 (fax) chad.richwine@kellyhart.com</p>
<p>FOR NRG TEXAS POWER, LLC: Joe Freeland Mathews & Freeland, L.L.P. Westpark II, Suite 260 8140 North Mopac Expressway Austin, Texas 78759-8884 512-404-7800 512-703-2785 (fax) jfreeland@mandf.com</p>	<p>FOR FRIENDS OF LAKE LIMESTONE: Mark Bissett 13415 Mount Airy Dr. Cypress, TX 77429 (713) 213-2581 (phone) mgbldb@entouch.net</p>
<p>FOR MIKE BINGHAM: <i>(served via certified mail)</i> Mike Bingham 1251 C.R. 184 Comanche, TX 76442 (254) 842-5899</p>	